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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO: A-943

PAUL RUIZ AND EARL DENTON, PETITIONERS,

V.

STATE OF ARKANSAS, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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VS.

STATE OF ARKANSAS, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

The petitioners, Paul Ruiz and Earl Denton, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas entered in this proceeding on Marcy 29, 1982.

QUESTIONS PRESENTED

1. Whether the Arkansas death penalty statutory scheme is unconstitutional in discouraging assertion of the Fifth Amendment right not to plead guilty and needlessly penalizing exercise of the Sixth Amendment right to trial by jury.

2. Whether the State court should have allowed petitioners an opportunity to present and develop, in a post-conviction proceeding, their claims of violations under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

OPINION BELOW

The Opinion of the Supreme Court of Arkansas was unpublished and thus is an unreported opinion. A copy of the opinion appears in Appendix B.

JURISDICTION

The Arkansas Supreme Court affirmed the convictions and sentences of petitioners on June 8, 1981, and a petition for writ of certiorari to the Supreme Court of Arkansas was denied by this Court on December 1, 1981. Subsequently, petitioners sought permission from the Supreme Court of Arkansas to seek post-conviction relief in the trial court, asserting that they were denied rights secured to them by the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. In an unpublished opinion delivered March 29, 1982, permission to seek review was denied.

An application for an order extending time for filing this petition for writ of certiorari was filed on May 17, 1982, and an extension granted until June 27, 1982.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3), petitioners asserting here and having asserted below a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions (quoted in relevant part only).

1. The Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. Act 28 of 1975, Section 1301 et seq. and Section 1307, codified as Ark. Stat. Ann. §§41-1301--41-1304, 41-1307, 41-1501(3) (Repl. 1977).

§41-1301. Trial of persons charged with capital murder. The following procedures shall govern trials of persons charged with capital murder:

(1) The jury shall first hear all evidence relevant to the charge or charges and shall then retire to reach a verdict of guilt or innocence.

(2) If the defendant is found not guilty of the capital offense charged, but guilty of a lesser included offense,

sentence shall be determined and imposed as provided by law.

(3) If the defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence as provided by subsection (4) hereof, and to determine sentence in the manner provided by Section 1301 [§41-1302]; except that, if the state waives the death penalty, stipulates that no aggravating circumstance exists, or stipulates that no such hearing shall be required, and the trial court shall sentence the defendant to life imprisonment without parole.

(4) In determining sentence, evidence may be presented to the jury as to any matters relating to aggravating circumstances enumerated in Section 1303 [§41-1303], or any mitigating circumstances. Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters; but the admissibility of evidence relevant to the aggravating circumstances set forth in Section 1303 [§41-1303] shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant or his counsel shall be permitted to present argument respecting sentencing.

§41-1302. Findings required for death sentence--unanimity required.

(1) The jury shall impose a sentence of death if it unanimously returns written findings that:

(a) aggravating circumstances exist beyond a reasonable doubt; and

(b) aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and

(c) aggravating circumstances justify a sentence of death beyond a reasonable doubt.

(2) The jury shall impose a sentence of life imprisonment without parole if it finds that:

(a) aggravating circumstances do not exist beyond a reasonable doubt; or

(b) aggravating circumstances do not outweigh beyond a reasonable doubt all mitigating circumstances found to exist; or

(c) aggravating circumstances do not justify a sentence of death beyond a reasonable doubt.

(3) If the jury does not make all findings required by subsection (1), the court shall impose a sentence of life imprisonment without parole.

§41-1303. Aggravating circumstances---Aggravating circumstances shall be limited to the following:

(1) the capital murder was committed by a person imprisoned as a result of a felony conviction;

(2) the capital murder was committed by a person unlawfully at liberty after being sentenced to imprisonment as a result of a felony conviction;

(3) the person previously committed another felony, an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person;

(4) the person in the commission of the capital murder knowingly created a great risk of death to a person other than the victim;

(5) the capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody;

(6) the capital murder was committed for pecuniary gain; or

(7) the capital murder was committed for the purpose of disrupting or hindering the lawful exercise of any government or political function.

§41-1304. Mitigating circumstances---Mitigating circumstances shall include, but are not limited to the following:

(1) the capital murder was committed while the defendant was under extreme mental or emotional disturbance;

(2) the capital murder was committed while the defendant was acting under unusual pressures or influences or under the domination of another person;

(3) the capital murder was committed while the capacity

of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse;

(4) the youth of the defendant at the time of the commission of the capital murder;

(5) the capital murder was committed by another person and the defendant was an accomplice and his participation relatively minor;

(6) the defendant has no significant history of prior criminal activity.

§41-1307. Waiver of death penalty---If a defendant is charged with capital murder, the prosecuting attorney, with the permission of the court, may waive the death penalty. In such cases, if the defendant pleads guilty to capital murder or is found guilty of capital murder after a trial to the court or to a jury, the court shall sentence the defendant to life imprisonment without parole.

§41-1501. Capital murder

(3) Capital murder is punishable by death or life imprisonment without parole pursuant to Chapter 13 [§§41-1301 - 41-1309]. For all other purposes other than disposition under Article III [§§41-801 - 41-1309], capital murder is a class A felony.

3. Act 124 of 1971, Section 2, codified as Ark. Stat. Ann. §43-2108.1(Repl. 1977).

§43-2108.1. Voluntary waiver of trial by jury---In all criminal cases where the maximum punishment is death by electrocution and the defendant waives a trial by jury, the Court must determine [that] the defendant's waiver is voluntary and is not made in response to any promise or threat and that the waiver is freely made without fear or compulsion.

4. Criminal Code, Section 172; as C & M Digest §3074; Popes Disgest §3900 as amended by Act 141 of 1953 and criminal code section 173; C & M Digest §3075; Pope's Digest §3901 codified as Ark. Stat. Ann. §§43-1220 to 43-1221 (Repl. 1977).

§43-1220. Kinds of pleas---There are but four (4) kinds of pleas to an indictment or information:

First. A plea of guilty.

Second. A plea of nolo contendere.

Third. Not guilty.

Fourth. A former conviction or acquittal of the offense charged, which may be placed with or without a plea of not guilty.

§43-1221. Plea of guilty--The plea of guilty can only be put in by the defendant himself in open court.

5. Arkansas Rules of Criminal Procedure, Rule 24.3 (Repl. 1977).

Rule 24.3. Pleading by Defendant.

(a) A plea of guilty or nolo contendere shall be received only from the defendant himself in open court, except that counsel may enter a plea of guilty on behalf of a defendant in misdemeanor cases where only a fine is imposed by the court. If the defendant is a corporation the plea may be received from counsel or an authorized corporate officer.

(b) A defendant may plead nolo contendere only with the consent of the court. The court shall not accept a plea of nolo contendere unless it is satisfied, after due consideration of the views of the parties, that the interest of the public in the effective administration of justice would thereby be served.

(c) No plea of guilty or nolo contendere shall be accepted by any court unless the prosecuting attorney of the governmental unit in which the offense occured is given opportunity to be heard at the time the plea is tendered.

6. Arkansas Rules of Criminal Procedure, Rules 31.1 -- 31.2 (Repl. 1977).

Rule 31.1. Waiver of Trial by Jury: Assent by Prosecutor.

No defendant in any criminal case may waive a trial by jury unless the waiver is assented to by the prosecuting attorney and approved by the court.

Rule 31.2. Waiver of Trial by Jury: Personal Request.

Should a defendant desire to waive his right to trial by jury, he must do so personally either in writing or in open court. A verbatim record of any proceedings at which a defendant waives his right to a trial by jury shall be made and preserved.

7. Arkansas Rules of Criminal Procedure, Rule 31.4 (Repl. 1977).

Rule 31.4. Waiver of Trial by Jury: Capital Felonies.

No defendant charged with a capital felony may waive either trial by jury on the issue of guilt or the right to have sentence determined by a jury unless:

(a) the court in which the cause is to be tried determines that the waiver is voluntarily and freely proffered without compulsion or coercion; and

(b) the prosecuting attorney, with the permission of the court, has waived the death penalty; and

(c) the prosecuting attorney has assented to the waiver of trial by jury, and such waiver has been approved by the court.

8. Arkansas Rules of Criminal Procedure, Rule 37.1 (Repl. 1977).

Rule 37.1(a) & (d). Scope of Remedy.

A prisoner, in custody under sentence of a circuit court and whose case was not appealed to the Supreme Court, claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:

(a) that the sentence was imposed in violation of the Constitution and laws of the United States or this state; or. .

(d) that the sentence is otherwise subject to collateral attack. . .

9. Arkansas Rules of Criminal Procedure, Rule 37.2(a), (b) (Repl. 1977).

Rule 37.2. Commencement of Proceedings; Pleadings; Permission of Supreme Court Following Appeal.

(a) If the conviction in the original case was appealed to the Supreme Court, then no proceedings under this rule shall

be entertained by the circuit court without prior permission of the Supreme Court.

(b) all grounds for relief available to a prisoner under this rule must be raised in his original or amended petition. Any grounds not so raised or any grounds finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction or sentence or in any other proceedings that the prisoner may have taken to secure relief from his conviction or sentence may not be the basis for a subsequent petition.

10. Arkansas Rules of Criminal Procedure, Rule 37.3 (Repl. 1977).

Rule 37.3. Nature of Proceedings; Summary Disposition; Appointment of Counsel; Evidentiary Hearings; Presence of Petitioner.

(a) If the motion and the files and records of the case conclusively show that the petitioner is entitled to no relief, the trial court shall make written findings to that effect, specifying any parts of the files or records that are relied upon to sustain the court's findings.

(b) If the original motion, or a motion to take an appeal from the court's findings under subsection (a) hereof, should allege that the prisoner is unable to pay the cost of the proceedings, or to employ counsel, and if the court is satisfied that this allegation is true, the circuit court shall appoint counsel for the prisoner for hearing in the circuit court and for an appeal to the Supreme Court.

(c) When a motion is filed in the circuit court mentioned in Rule 37.1, and the court does not dispose of the motion under subsection (a) hereof, the court shall cause notice of the filing thereof to be served on the prosecuting attorney; and on the motion the court shall grant a prompt hearing with proceedings reported. Objections to the court's rulings are required, but exceptions need not be saved. The court shall determine the issues and make written findings of fact and conclusions of law with respect thereto. If the prisoner desires to be present at the hearing for taking testimony the court shall order his presence.

STATEMENT OF THE CASE

Petitioners Paul Ruiz and Earl Denton were charged by amended information filed November 18, 1977, with capital murder in violation of Ark. Stat. Ann. §1501, Ark. Stat. Ann. §1501 (Repl. 1977).

Trial by jury began on September 18, 1979 and was concluded on October 3, 1979. Petitioners were represented by two court appointed attorneys in the guilt phase of the trial. The State introduced evidence which established that petitioners shot and killed Marvin Ritchie, a town marshall and Opal James, a park ranger. No evidence was presented as to which of petitioners actually fired the fatal shots. The jury found petitioners guilty as charged.

In the sentencing phase of their trial, petitioners were represented by one court appointed attorney. The State presented testimony that petitioners had escaped from a penitentiary in 1977, and counsel stipulated to introduction of petitioners' prior criminal records. The defense presented several witnesses, each of whom testified about both petitioners. A clergyman testified briefly about the background of both Paul Ruiz and Earl Denton and stated that each was able to care for others even in a penitentiary environment and that both should be allowed to live. Psychological testimony was that petitioner Ruiz suffered from an anti-social personality and petitioner Denton was a schizoid personality with some paranoid features, that such disorders developed from early emotional deprivation, and that increased anxiety would impair the ability of petitioners to conform their conduct to the law.

The jury delivered findings that five aggravating circumstances did exist beyond a reasonable doubt, that there was no evidence of any mitigating circumstances, and that petitioners were to die by electrocution.

Upon completion of testimony in the penalty phase of trial, petitioners responded to questions of one of the attorneys representing petitioners in the guilt phase. Counsel stated

on the record that all three attorneys had discussed at length with petitioners the possibility of a conflict due to joint representation by attorneys on the guilt phase and by the attorney responsible for the sentencing phase of trial. He asked each of the petitioners if, in fact, the possibility of a conflict was discussed with them. Both responded in the affirmative and indicated they had no objection to joint representation. At the conclusion of trial and before petitioners were allowed to exercise their right of allocution, the court asked each of the petitioners if he was satisfied with the legal representation received. Both indicated they were.

Petitioners' convictions and sentences were affirmed, Ruiz vs. State, 273 Ark. 94, 617 S.W.2nd 6 (1981), and rehearing was denied by the Arkansas Supreme Court on July 6, 1981. Petitioners sought review by petition for writ of certiorari from the Supreme Court of the United States, which petition was denied on December 1, 1981.

Subsequently, through present counsel, petitioners sought permission to seek post-conviction relief contending that: (1) the Arkansas death penalty statute is facially unconstitutional, since it discourages assertion of the Fifth Amendment right not to plead guilty and penalizes exercise of the Sixth Amendment right to trial by jury; (2) petitioners sentences were imposed in violation of their Sixth, Eighth and Fourteenth Amendment rights to counsel at the penalty stage of their trial. Petition to seek review of these contentions was denied by the Supreme Court of Arkansas.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioners' questions arise from their contentions in the Arkansas Supreme Court that the Arkansas death penalty statute denied them rights secured by the Fifth and Sixth Amendments and that they were denied the right to effective assistance of

counsel as guaranteed by the Sixth, Eighth and Fourteenth Amendments. Permission to proceed for post-conviction review of these contentions was denied and the contentions were summarily rejected.

The Arkansas Supreme Court stated that the issues presented by petitioners must be considered waived since neither was raised in accordance with controlling rules of procedure. Ruiz vs. State, No. 80-147, slip op. at 2 (S.Ct.Ark. Mar. 29, 1982). (Attached hereto as Appendix B) The court, however, did address on its merits the issue of unconstitutionality of the Arkansas death penalty statute, finding that the principle set forth in United States vs. Jackson, 390 U.S. 570, 885 S.Ct. 1209, 20 L.Ed.2nd 138 (1968), upon which petitioners relied, had been erroded and was not controlling. Ruiz vs. State, Id. at 2-3.

With respect to denial of permission to proceed with an evidentiary hearing on the issue of ineffectiveness of counsel, the court stated that petitioners offered no facts to show that their acquiescence to joint representation by counsel was not intelligently and voluntarily given. Ruiz vs. State, Id. at 4-5. The court stated further that no specific evidence of prejudice was provided in petitioners' motion, thus, petitioners did not demonstrate by clear and convincing evidence that they were denied a fair trial. Ruiz vs. State, Id. at 5.

REASONS FOR GRANTING THE WRIT

A.

THE ARKANSAS DEATH PENALTY STATUTE IS FACIALLY UNCONSTITUTIONAL SINCE IT DISCOURAGES ASSERTION OF THE FIFTH AMENDMENT RIGHT NOT TO PLEAD GUILTY AND PENALIZES EXERCISE OF THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY.

In accordance with the Arkansas death penalty statute, a defendant who chooses to exercise his Sixth Amendment right to a trial by jury faces the possibility of imposition of the death penalty. Under the applicable statute, capital murder is punishable by life imprisonment without parole or death, Ark. Stat. Ann. §41-1501(e)(Repl. 1977), and the sentence

determination is governed by the procedures set forth in Ark. Stat. Ann. §41-1301 et seq., Ark. Stat. Ann. §§41-1301, 41-1302, 41-1307 (Repl. 1977). Ark. Stat. Ann. §41-1301(1) provides that the jury shall first hear all evidence relevant to the charge and then shall retire to render a verdict of guilt or innocence of the capital charge. If the verdict is guilty, "the same jury shall sit again" to hear additional evidence and determine sentence, (emphasis added). The same jury must impose a sentence of death if it unanimously finds beyond a reasonable doubt that: (1) aggravating circumstances exist; (2) aggravating circumstances outweigh all mitigating circumstances found to exist; and (3) aggravating circumstances justify a sentence of death. Ark. Stat. Ann. §41-1302(1) (Repl. 1977). If that jury does not make those three findings, a sentence of life imprisonment without parole must be imposed. Ark. Stat. Ann. §41-1302(2)(Repl. 1977).

Under the Arkansas statutory framework, the penalty of death can only be imposed by a jury which makes the findings required under Ark. Stat. Ann. §41-1302(1). Ark. Stat. Ann. §41-1302(1)(Repl. 1977), and that jury must be the same jury that determined the defendant's guilt. Ark. Stat. Ann. §§41-1301(1), 41-1301(3)(Repl. 1977). The trial court may never impose a sentence of death, but is required to impose a sentence of life imprisonment without parole in the following circumstances:

(a) when the State waives the death penalty or stipulates the jury cannot, on the evidence, make the required findings under Ark. Stat. Ann. §41-1302, ARK. STAT. ANN. §41-1301(3)(Repl. 1977);

(b) when the jury does not make the findings under Ark. Stat. Ann. §41-1302, ARK. STAT. ANN. §41-1302(3)(Repl. 1977);

(c) when the prosecuting attorney, with the court's permission, waives the death penalty and (i) the defendant pleads guilty, or (ii) the defendant is found guilty after trial to the court or to a jury, ARK. STAT. ANN. §41-1307 (Repl. 1977).

Upon the face of the Arkansas statutory scheme it is clear that only the same jury which determines guilt is authorized to return a verdict of death; and the statute sets forth no procedure for imposing the death penalty upon a defendant who waives the right to a jury trial or upon one who pleads guilty.

While a defendant has no constitutional right to enter a plea of guilty, a state may confer such a right by statute or other means. North Carolina vs. Alford, 400 U.S. 25, 38 n.11, 91 S.Ct. 160, 168 n.11, 27 L.Ed.2nd 162 (1970). In Arkansas, as established by statute and rules, a defendant has a right to plead guilty and a right to waive trial by jury, ARK. STAT. ANN. §43-2108.1 (Repl. 1977); ARK. STAT. ANN. §43-1220 -- 43-1221 (Repl. 1977); ARK. R. CRIM. P., §§ 24.3, 31.1, 31.2, 31.4. Rule 31.4 limits the scope of the capital defendant's right to waive a jury trial. That rule provides:

> "No defendant charged with a capital felony may waive either trial by jury on the issue of guilt or the right to have sentence determined by jury unless:
>
> (a) the court in which the cause is to be tried determines that the waiver is voluntarily and freely proffered without compulsion or coercion; and
>
> (b) the prosecuting attorney, with the permission of the court, has waived the death penalty; and
>
> (c) the prosecuting attorney has assented to the waiver of trial by jury, and such waiver has been approved by the court."

Rule 31.4 clearly makes it impossible for a capital defendant to waive a jury trial or jury sentencing in a bifurcated proceeding, see generally, ARK. STAT. ANN. §41-1301(3), unless the death penalty has been waived by the prosecutor with permission of the court. Only the same jury which determines guilt can impose a sentence of death, see, ARK. STAT. ANN. §41-1501(3)(Repl. 1977), whereas there can be no trial by the court or sentencing by the court unless the death penalty has been waived. In such cases, if the defendant pleads guilty or is found guilty after a trial to the court or to a jury, the court must sentence the defendant to life imprisonment without parole. ARK. STAT. ANN. §41-1307(Repl. 1977).

It appears, therefore, that under the Arkansas statutory

scheme, the severity of punishment is dependent upon the way guilt is determined--e.g., by a plea of guilty, by a bench trial, or by a jury trial. The defendant who abandons his right to contest his guilt before a jury is assured that he cannot be executed, while the defendant desirous of seeking a jury acquittal stands forewarned that, if the jury finds him guilty, and does not wish to spare his life, he will die. Such a procedure thereby imposes a impermissible burden on the exercise of constitutional rights, since the inevitable effect of the statutory provisions "is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." United States vs. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2nd 138 (1968). See also, State vs. Frampton, 95 Wash.2nd 469, 627 P.2nd 922 (1981); State vs. Martin, 94 Wash.2nd 1, 614 P.2nd 164 (1980). A statute, such as the one presently in effect in Arkansas, which encourages guilty pleas and discourages the exercise of constitutional rights is facially unconstitutional and is unconstitutional as applied to any defendant who pleads guilty or is found guilty by a jury. Id.

Though the Supreme Court of Arkansas has stated in its opinion below that Jackson is not controlling and has been erroded, Ruiz vs. State, No. 80-147, slip op. at 2-3 (S.Ct. Ark. Mar. 29, 1982)(Attached hereto as Appendix B), petitioners assert that the principle announced in that case has continuing viability and is fully applicable to the present case. These statements by the Arkansas court are accompanied by no authority, except that the court in its opinion cites to the dissenting opinion in Corbitt vs. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2nd 466 (1978). Ruiz vs. State, Id. at 4. A capital sentencing scheme is unconstitutional where, as here, the death sentence can only be imposed upon a recommendation of a jury accompanying a guilty verdict, whereas the maximum penalty for those tried to the court after waiving a jury and for those pleading guilty is life imprisonment. This principle, as it

relates to capital sentencing schemes, was apparently reaffirmed in Corbitt vs. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2nd 466 (1977). In refusing to extend the rationale of Jackson to the facts presented in Corbitt, this Court emphasized the continuing viability of the decision in Jackson in the capital sentencing context:

> "We agree with the New Jersey Supreme Court that there are substantial differences between this case and Jackson, and that Jackson does not require a reversal of Corbitt's conviction. The principle difference is that the pressures to forego trial and to plead to the charge in this case are not what they were in Jackson. First, the death penalty, which is "unique in its severity and irrevocability," Gregg vs. Georgia, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2nd 859 (1976, is not involved here. Although we need not agree with the New Jersey court that the Jackson rationale is limited to those cases where a plea avoids any possibility of the death penalty's being imposed, it is a material fact that under the New Jersey law the maximum penalty for murder is life imprisonment, not death. Furthermore, in Jackson, any risk of suffering the maximum penalty could be avoided by pleading guilty. Here, although the punishment when a jury finds a defendant guilty of first degree murder is life imprisonment, the risk of that punishment is not completely avoided by pleading non vult because the judge accepting the plea has the authority to impose a life term. New Jersey does not reserve the maximum punishment for those who insist on a jury trial.

Corbitt vs. New Jersey, 439 U.S. 217, 99 S.Ct. 492, 58 L.Ed.2nd 466 (1979)(emphasis added).

The key to the holding in Jackson is that a statutory scheme cannot constitutionally impose an impermissible burden upon the assertion of constitutional rights. United States vs. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2nd 138 (1968). See, State vs. Frampton, 95 Wash.2nd 469, 627 P.2nd 922 (1981). A statute simply cannot impose a penalty such as death in a manner that needlessly penalizes the assertion of those rights. See, Griffin vs. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2nd 106 (1965). Specifically, with regard to the Arkansas statutory scheme, the death penalty may be imposed upon a capital defendant only through exercise of his Sixth Amendment right to a trial by jury.

The fact that the Arkansas Supreme Court stated in Collins vs. State, 261 Ark. 195, 548 S.W.2nd 106 (1977), that a trial judge is not required to impose the death sentence in every case in which the jury prescribes it, but may reduce the sentence

if it is deemed excessive, is not relevant under the rationale of Jackson. The fact remains that under the Arkansas statutory scheme a defendant that pleads guilty or waives a trial by jury cannot receive the death penalty whereas a defendant who exercises his right to a jury trial may. That is the constitutionally impermissible burden imposed upon the capital defendant. The existence of a remote and highly unlikely possibility that the trial court may reduce the sentence of death which can be imposed only be exercise of the right to trial by jury, does not lessen that burden, particularly in light of the fact that petitioners are unaware of any such reduction in the entire history of the Arkansas death penalty statute.

Under the Arkansas statute, a defendant is cognizant of the fact that the jury--and only the jury--is authorized to say he shall die. Any statute which makes the imposition of a death sentence only possible for those who assert their right to contest guilt before a jury unconstitutionally chills the assertion of basic constitutional rights. See, United States vs. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2nd 138 (1968); State vs. Frampton, 95 Wash.2nd 469, 627 P.2nd 922 (1981). Having that prohibited effect, the Arkansas statutory scheme is repugnant to the Constitution of the United States.

B.

PETITIONERS WERE DENIED AN OPPORTUNITY TO PRESENT AND DEVELOP, IN A POSTCONVICTION PROCEEDING, THEIR CLAIMS OF VIOLATIONS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Arkansas Supreme Court, in denying petitioners' permission to proceed with an evidentiary hearing on the issue of ineffective assistance of counsel indicated that petitioners were procedurally barred from raising the issue in a post-conviction proceeding. Ruiz vs. State, No. 80-147, slip op. at 2 (S.Ct.Ark. Mar. 29, 1982)(Attached hereto as Appendix B) It is, of course, without question that this Court will not review a decision of a state court which rests on adequate and

independent non federal grounds, Bell vs. Maryland, 378 U.S. 226, 84 S.Ct. 1814, 12 L.Ed.2nd 822 (1964); Smith vs. Smith, 366 U.S. 210, 81 S.Ct. 1050, 6 L.Ed.2nd 233 (1961), and that it is for this Court to ascertain the actual basis of the state court decision and whether a non federal ground properly supports a judgment so as to preclude review. See, NAACP vs. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2nd 1488 (1958); Guaranty Trust Co. vs. Blodgett, 287 U.S. 509, 53 S.Ct. 244, 77 L.Ed. 463 (1932). However, petitioners herein respectfully assert that if the decision of the Arkansas court does in fact rest on procedureal non federal grounds, such grounds do not adequately support the judgment.

Since a federal right cannot be denied on insubstantial grounds, a procedural bar to review in this Court must have fair and substantial support. Ward vs. Love County, 253 U.S. 17, 22, 40 S.Ct. 419, 64 L.Ed. 751, 758 (1920); Wolfe vs. North Carolina, 364 U.S. 177, 80 S.Ct. 1482, 4 L.Ed.2nd 1650 (1960) reh. denied, 364 U.S. 856, 81 S.Ct. 29, 5 L.Ed.2nd 80 (1960); Staub vs. Baxley, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2nd 302 (1958). The Arkansas court in the instant case said "the issues were not raised in accordance with controlling rules of procedure and must be considered waived." Ruiz vs. State, No. 80-147, slip op. at 2 (S.Ct.Ark. Mar. 29, 1982)(Attached hereto as Appendix B). In support of this statement, the Court cited Moore vs. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2nd 706 (1972), Stembridge vs. Georgia, 343 U.S. 541, 72 S.Ct. 834, 96 L.Ed. 1130 (1952), Williams vs. Edmondson, 257 Ark. 837, 250 S.W.2nd 260 (1975), and Orman vs. Bishop, 245 Ark. 887, 435 S.W.2nd 440 (1968), all of which state that an issue cannot be presented for the first time on appeal. That rule would appear to have no relevancy to a request for a hearing on postconviction relief. The court below relies also on its decision in Hulsey vs. State, 268 Ark. 312, 595 S.W.2nd 934, reh. denied, 268 Ark. 315, 599 S.W.2nd 729 (1980), where is said that contentions not raised on direct

appeal are waived and cannot be raised in a proceeding for post-conviction relief. To substantiate that position, the court in Hulsey relied upon Sarko vs. Edwards, 252 Ark. 1082, 482 S.W.2nd 262 (1972), a civil appeal from a judgment entered in accordance with a jury verdict. The defendant appellant in that case contended that the statute of frauds made the contract unenforceable but did not support the contention by argument on appeal. Thus, the court pointed out that those issues not argued on appeal are waived. That well accepted principle also seems to have little to do with proceedings for postconviction relief. The Arkansas court, however, relying in part on its opinion in Hulsey makes the statement in Neal vs. State, 270 Ark. 442, 605 S.W.2nd 421 (1980), that the Arkansas post-conviction procedural rule is not intended to permit the petitioner to present questions which were passed upon direct appeal. The Arkansas rule does state:

> "All grounds for relief available to a prisoner under this rule must be raised in his original or amended peititon. Any grounds not so raised or any grounds finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction or sentence or in any other proceedings that the prisoner may have taken to secure relief from his conviction or sentence may not be the basis for a subsequent petition."

ARK. R. CRIM. P., §37.2. The court further states in Neal that neither does the postconviction procedure permit an prisoner to raise questions which might have been raised at trial or on direct appeal. In Douglas vs. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2nd 934 (1965) this Court stated that a state procedural bar to review of federal rights must be reasonable. The Arkansas court has created an impossible dilemma for prisoners who seek postconviction relief. One cannot seek relief for questions presented upon direct appeal. ARK. R. CRIM. P., § 37.2, and one cannot seek relief for questions not presented upon direct appeal. In the face of such a ruling, and in a case where federal constitutional rights are in question and where the prisoner's sentence is death by electrocution, the petitioner is left in a position

of helpless confusion and frustration. In justification of its position the Arkansas Supreme Court has stated that contentions not raised at trial or thereafter on first appeal are waived so that criminal prosecutions in Arkansas courts may have finality. Hulsey vs. State, 268 Ark. 312, 595 S.W.2nd 934 (1980). It is well established that a state procedural rule barring review of federal rights must have a legitimate state purpose. Douglas vs. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2nd 934 (1965); Henry vs. Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2nd 408 (1965); NAACP vs. Alabama, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2nd 325 (1964). The Arkansas court is indicating in Hulsey that decisions in capital cases must be final so that the purpose or end of finality may be served. The punishment of death is certainly final, and to prevent presentation of rights under the United States Constitution for those persons who have received such a sentence does serve the purpose of finality. Yet, in so doing, such a rule appears to stand, not as a legitimate state purpose, but as a rule so unfounded as to be essentially arbitrary--a rule used to prevent review of a claim of federal rights. See, Enterprise Irrigation Dist. vs. Farmers Mut. Canal Co., 243 U.S. 153, 37 S.Ct. 318, 61 L.Ed. 644 (1916).

Additionally, petitioners contend that they justifiably relied upon prior decisions of the Arkansas court which are difficult to reconcile with the holding in the case at hand. This Court has said that an adequate non federal ground must be well established so that one may be fairly apprised thereof, see, NAACP vs. Alabama, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2nd 325 (1964), and that novelty in procedural requirements cannot be permitted to thwart review in the United States Supreme Court, applied for by those who, in justified reliance upon prior decisions, seek vindication in the federal courts of their federal constitutional rights. NAACP vs. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2nd 1488 (1958).

In Blackmon vs. State, 268 Ark. 316, 595 S.W.2nd 689 (1980), an appeal from denial by the trial court of a hearing

on postconviction relief, the Supreme Court held that where the record did not conclusively show that appellant was not entitled to a hearing on his allegation of ineffective assistance of counsel, the trial court should have granted the hearing. See, Cusick vs. State, 259 Ark. 720, 536 S.W.2nd 119 (1976); Cullens vs. State, 252 Ark. 995, 482 S.W.2nd 95 (1972); see also, Cross vs. United States, 392 F.2nd 360 (8th Cir. 1968). The court further related that an evidentiary hearing in the trial court better equips the appellate court on review to examine in detail the sufficiency of the representation below. Rule 37.3 of the Arkansas Rules of Criminal Procedure provides that a motion for postconviction relief may be disposed of without an evidentiary hearing by the trial court only if the motion and the files and records of the case conclusively demonstrate petitioner is not entitled to relief requested. ARK. RULES CRIM. PRO., Rule 37.3. This rule is a directive to the trial judge, to be utilized whenever a petition is before him. Prisoners who have not taken appeal file such petitions directly with the trial court. ARK. RULES CRIM. PRO., Rule 37.1. When, as in the instant case, the prisoner has taken appeal, since the trial court has lost jurisdiction, he must ask permission of the Supreme Court to present his petition to the trial court. ARK. RULES CRIM. PRO., Rule 37.2. Rule 37.3, therefore, should be applicable to all cases whether or not appeal has been taken. Regardless of that rule, the Arkansas Court has ruled that an evidentiary hearingis necessary for determination of ineffective asisstance of counsel. In Hilliard vs. State, 259 Ark. 81, 531 S.W.2nd 463 (1976), the appellant on direct appeal to the Arkansas Supreme Court presented the issue of ineffective assistance of counsel. The court decided that the contention could not be considered on first appeal but that appellant had the right to raise the question in the trial court before appeal or subsequently by motion for postconviction relief. The court's rationale for its decision was that an evidentiary hearing on the matter would better equip the Supreme Court

on review to examine in detail the sufficiency of representation below. Furthermore, it is frequently noted by the Arkansas court that a prisoner is to be afforded a postconviction remedy in any case where the sentence was imposed in violation of the Constitution of the United States or is otherwise subject to collateral attack. Swindler vs. State, 272 Ark. 340, 617 S.W.2nd 1 (1981); Collins vs. State, 271 Ark. 825, 611 S.W.2nd 182 (1981); Hulsey vs. State, 268 Ark. 312, 595 S.W.2nd 934, reh. denied, 268 Ark. 315, 599 S.W.2nd 729 (1980); Swisher vs. State, 257 Ark. 24, 514 S.W.2nd 218 (1974); Thacker vs. Urban, 246 Ark. 956, 440 S.W.2nd 553 (1969); Clark vs. State, 242 Ark. 584, 414 S.W.2nd 601 (1967). See. ARK. R. CRIM. P., Rule 37.1. Petitioners, therefore, contend that in reliance upon these decisions, they plainly and reasonably attempted to assert their Federal rights and that such reliance was justified. "Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Davis vs. Wechsler, 263 U.S. 22, 24, 44 S.Ct. 13, 68 L.Ed. 143 (1923).

For these and the foregoing reasons, petitioners reiterate that the State of Arkansas has not set forth a state ground for its decision adequate to bar review in this Court.

Petitioners' request of the court below was that they be allowed permission to proceed for an evidentiary hearing in the trial court on the issue of ineffective assistance of counsel. Specifically, they alleged that joint representation by a singular attorney in the sentencing phase of their trial caused them to be deprived of their rights under the Sixth and Fourteenth Amendments to effective assistance of counsel at the sentencing phase of their trial, see, Gardner vs. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2nd 393 (1977), and their right under the Eighth Amendment to have the jury consider as mitigating factors, any relevant aspect of their individual characters or backgrounds and any circumstances of their offense. Lockett vs. Ohio, 438 U.S. 586, 98 S.Ct. 2954,

57 L.Ed.2nd 973 (1978); see generally, Gregg vs. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2nd 859 (1976). After ruling that the issue was waived because not raised in accordance with controlling rules of procedure, the court noted that the Arkansas court had adopted a different standards of review of ineffective assistance of counsel than has the Eighth Circuit and stated that petitioners offered no facts to show they did not intelligently and voluntarily acquiesce to joint representation and that they had not shown clear and convincing evidence of prejudice. Ruiz vs. State, No. 80-147, slip op. at 4-5 (Ark.S.Ct. Mar. 29, 1982)(Attached hereto as Appendix B). It is quite certain that in Arkansas a charge of inadequate representation can prevail only if the acts or omissions of an accused's attorney result in making the proceedings a "farce and a mockery of justice, shocking the conscience of the Court. . .", Sheppard vs. State, 255 Ark. 40, 498 S.W.2nd 668 (1973); Leasure vs. State, 254 Ark. 961, 497 S.W.2nd 1 (1973), while the test for incompetency in the Eighth Circuit Court of Appeals is whether counsel failed to exercise the skill and diligence of a reasonably competent attorney. McQueen vs. Swenson (McQueen III), 560 F.2nd 959, 961 (8th Cir. 1977); Thomas vs. Wyrick, 535 F.2nd 407, 414 (8th Cir. 1976); McQueen vs. Swenson (McQueen I), 498 F.2nd 207, 220 (8th Cir. 1974). However, petitioners referred to such tests in the court below and do so here,only to make a distinction between incompetence of counsel and multiple representation by counsel, both of which may be the basis of a claim under the Sixth Amendment of the Constitution of the United States. The standards above are for determination of competency. Multiple or joint representation is a different matter.

Representation of more than one defendant by the same lawyer does not necessarily constitute a deprivation of effective assistance of counsel. It is not a violation of one's rights for his attorney to also represent a codefendant so long as the representation is effective and does not present a

conflict of interest operating to the prejudice of the accused. Glasser vs. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680, reh. denied, 315 U.S. 827, 62 S.Ct. 629, 86 L.Ed. 1222 (1941). See, ABA Standards, Defense Function §4-3.5(b). In Holloway vs. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2nd 426 (1978), this Court had occasion to deal with an instance of multiple representation. There is was decided that whenever a trial court improperly requires, over timely objection, a single attorney to represent codefendants, reversal is automatic and prejudice is presumed regardless of whether proof of a conflict of interest was independently shown. In that situation there is no requirement that a defendant show that a conflict of interest--which he and his counsel tried to avoid by timely objections to the joint representation,prejudiced him in some specific fashion. Petitioners are aware, however, that multiple representation in the sense that the same counsel actively represented multiple defendants does not violate the Sixth Amendment unless it gives rise to a conflict. Cuyler vs. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2nd 333 (1980). In this case neither petitioners nor counsel for the sentencing phase of their trial voiced their objections to the multiple representation. In order to establish a Sixth Amendment violation arising from multiple representation by an attorney, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance, and until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim. Cuyler vs. Sullivan, Id. Present counsel for petitioners alleged in petitioners' motion to the Arkansas Supreme Court the existence of a conflict of interest in the sentencing phase of petitioners capital murder trial. The motion indicated that mitigating factors should have been separately and independently presented for each petitioner since their backgrounds and psychological profiles were dissimilar and their past criminal records distinguishable. Additionally,

it was alleged that circumstances surrounding the crime were not the same with regard to each defendant and that counsel was precluded by his conflict in representation from presenting the differing degree of culpability of the two defendants as a mitigating factor for the one less culpable. No specific evidence was provided, since counsel anticipated the possible necessity of her appointment in the trial court to represent one of the petitioners at the evidentiary hearing requested by the motion. Present counsel herself had a potential conflict of interest. Had counsel done more than assert her knowledge of the existence of the conflict at the sentencing phase of petitioners' trial and pursued with both petitioners the detailed factual basis thereof, she could have represented neither petitioner at a hearing on the merits of their claim.

The Arkansas court correctly observed that petitioners in their motion presented no evidence to show that their acquiescence to joint representation was not voluntarily and intelligently given. Ruiz vs. State, No. 80-147, slip op. at 5 (Mar. 29, 1982)(Attached hereto as Appendix B). It is difficult to understand how one can waive right to counsel after the trial is completed, see generally, Uvegas vs. Pennsylvania, 335 U.S. 437, 69 S.Ct. 184, 93 L.Ed. 127 (1948), but where right to counsel is of such critical importance as to be an element of due process, a finding of waiver is not lightly to be made, Westbrook vs. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2nd 429 (1966); Moore vs. Michigan, 355 U.S. 155, 78 S.Ct. 191, 2 L.Ed.2nd 167 (1957), and generally an issue of waiver depends on facts and circumstances of a particular case, North Carolina vs. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2nd 286 (1979). One factor, such as is not conclusive, Id., and all of the facts and circumstances can only be presented at an evidentiary hearing.

With regard to the comment by the Arkansas court that a petitioner must show by clear and convincing evidence that

the prejudice which resulted from the representation of trial counsel was such that he did not receive a fair trial, Ruiz va. State, No. 80-147, slip op. at 5 (Ark.S.Ct. Mar. 29, 1982), (Attached hereto as Appendix B), but see, Eddings vs. Oklahoma, _____U.S._____, 102 S.Ct. 869, 71 L.Ed.2nd_____(1982), petitioners contend that, the rule for incompetency cases notwithstanding, prejudice is not the issue here. Unconstitutional multiple representation is never harmless error, and accordingly a defendant shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief, the conflict itself demonstrating a denial of the right to have effective assistance of counsel. Cuyler vs. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2nd 333 (1980). Petitioners'request in the Arkansas Supreme Court was merely for an evidentiary hearing to show that such a conflict was present at the sentencing phase of their trial.

It is petitioners' understanding that they are entitled to such a hearing. Petitioners are cognizant that this Court has not decided whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for hearing and determination of claims of violation of federal constitutional guarantees, Case vs. Nebraska, 381 U.S. 336, 85 S.Ct. 1486, 14 L.Ed.2nd 422 (1965), the necessity of that decision having been obviated by Nebraska's adoption of just such a statute. Arkasnas too has adopted a procedure which, on its face, provides for hearing and determination of federal constitutional claims. See, ARK. RULES, CRIM. PRO., Rule 37. In Case this Court took notice that a problem existed because in some jurisdictions prisoners were altogether precluded from access to the courts and in many more, the procedures recognized by state law failed to provide genuine opportunities for testing constitutional issues, with the result that prisoners often failed to obtain hearings on their allegations in state courts. Not wishing to belabour the obvious, petitioners herein reiterate that a genuine opportunity to test their claims under the United

States Constitution were denied them by the Supreme Court of Arkansas. Long ago this Court made it clear that states must afford some clearly defined method by which prisoners may raise calims of denial of federal rights, Young vs. Ragen, 337 U.S. 235, 69 S.Ct. 1073, 93 L.Ed. 1333 (1949), since the doctrine of exhaustion of state remedies. . .presupposes that some adequate state remedy exists. Id. That remedy should provide for full fact hearings to resolve disputed factual issues, and for compilation of a record to enable federal courts to determine the sufficiency of those hearings. Id. (concurring opinion); Townsend vs. Sain, 372 U.S. 293, 312-318, 83 S.Ct. 745, 9 L.Ed.2nd 770, 785-788 (1963). Petitioners thus reassert that such a hearing should have been granted them by the court below for presentment of their claims under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the reasons set forth, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Arkansas.

RESPECTFULLY SUBMITTED,

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